

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

ROBERT LEE GREENE,
Appellant,

DOCKET NUMBER
AT-0752-10-1029-A-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: January 30, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Elaine L. Fitch, Esquire, Washington, D.C., for the appellant.

Diane M. McDevitt, Esquire, Arlington, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

The agency has filed a petition for review in this case asking us to reconsider the addendum initial decision issued by the administrative judge, which awarded the appellant attorney fees. Generally, we grant petitions such as

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).² After fully considering the filings in this appeal, and based on the following points and authorities, we GRANT the petition for review and REVERSE the initial decision. We DENY the appellant's motion for attorney fees because he is not a prevailing party.

During the merits phase of this case, the agency cancelled the appellant's indefinite suspension, provided him with back pay and benefits, and moved to dismiss the appeal as moot. Initial Appeal File (IAF), Tab 14. The administrative judge denied the motion, finding that the appellant had a pending claim for compensatory and consequential damages based on claims of reprisal for equal employment opportunity activity and whistleblowing. IAF, Tab 20. The administrative judge then adjudicated the case and reversed the indefinite suspension upon finding that the action violated the efficiency of the service standard because it was based solely on the agency's investigation into possible misconduct. IAF, Tab 25 at 2, 4-10; *see Gonzalez v. Department of Homeland Security*, [114 M.S.P.R. 318](#) (2010). The administrative judge also found that the appellant did not prove his affirmative defenses. IAF, Tab 25 at 10-14. The

² Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

administrative judge ordered the agency to cancel the suspension, retroactively restore the appellant, and pay the appellant back pay and benefits. *Id.* at 15.

After the agency filed a petition for review of the initial decision, the Board issued a nonprecedential Final Order vacating the portion of the initial decision that ordered the agency to “rescind an adverse action that no longer existed and to give to the appellant back pay and benefits that had already been provided.” Petition for Review File, Tab 4 at 3-4. The Board noted that, although the administrative judge “needed to discuss the validity of the agency’s action, and therefore its policy, to reach his holding regarding the appellant’s compensatory damages, the administrative judge’s order to the agency to rescind the adverse action was moot. *See Currier*, 72 M.S.P.R. at 200.” *Id.* at 3.

After the appellant filed a motion for attorney fees and expenses, the administrative judge granted the motion upon finding that the appellant was a prevailing party because the Board’s Final Order “embraced” the initial decision’s analysis and left undisturbed the initial decision’s findings that the indefinite suspension and a provision of the agency’s handbook were invalid as a matter of law. Addendum Appeal File, Tab 8 at 1, 4-5. The administrative judge found that the Board altered the legal relationship of the parties because it affirmed the appellant’s right to present his appeal and affirmative defenses over the agency’s objection. *Id.* at 5. On petition for review, the agency asserts, among other things, that the appellant was not a prevailing party because there was no material alteration of the legal relationship between the appellant and the agency as a result of the adjudication of this appeal.

Under [5 U.S.C. § 7701](#)(g)(1), which is applicable to cases such as this one, to establish entitlement to an award of attorney fees an appellant must show that: (1) he was the prevailing party; (2) he incurred attorney fees pursuant to an existing attorney-client relationship; (3) an award of fees is warranted in the interest of justice; and (4) the amount of fees claimed is reasonable. *Driscoll v.*

U.S. Postal Service, [116 M.S.P.R. 662](#), ¶ 7 (2011); *Irvine v. Office of Personnel Management*, [86 M.S.P.R. 484](#), ¶ 9 (2000); see [5 U.S.C. § 7701\(g\)\(1\)](#).

Under *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, [532 U.S. 598](#), 604 (2001), which the Board has expressly adopted, an appellant is considered to have prevailed and to be entitled to attorney fees only if he obtains an “enforceable order” resulting in a “material alteration of the legal relationship of the parties.” *E.g.*, *Baldwin v. Department of Veterans Affairs*, [115 M.S.P.R. 413](#), ¶ 11 (2010). A party prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying one party’s behavior in a way that directly benefits the other. *Id.* We find that the appellant is not a prevailing party because this standard has not been met in this case.

The Board has the authority to “order any Federal agency or employee to comply with any order or decision” of the Board and to enforce compliance with any such “order.” [5 U.S.C. § 1204\(a\)\(2\)](#). In the prior nonprecedential Final Order in this case, there was no enforceable “order” issued by the Board requiring the agency to do anything, let alone provide the appellant with actual relief on the merits of his claim. The Board did not, for example, order the agency to comply with the Board’s interpretation of the agency’s handbook or to take or refrain from taking any other action. Instead, the Board expressly vacated the “order” language in the initial decision. While the initial decision made certain *findings* relating to the indefinite suspension that the Board may not have expressly vacated in the prior nonprecedential Final Order, such *findings*, standing alone, do not amount to an “enforceable order” or actual relief that materially changed the parties’ legal relationship.

The administrative judge appears to have found that the parties’ legal relationship was altered by the order he issued, left unchanged by the Board, denying the agency’s motion to dismiss, which thereby preserved the appellant’s right to present his appeal and affirmative defenses and required the agency to

defend against those claims. Such an approach to the prevailing party inquiry, however, has been rejected by our reviewing court. *See Sacco v. Department of Justice*, [317 F.3d 1384](#), 1386 (Fed. Cir. 2003) (preliminary conclusions, such as those set forth in an administrative judge's Order and Summary, neither establish judicial imprimatur nor constitute a court-ordered change in the legal relationship of the parties to permit an award).

Accordingly, we find that the appellant has not established that he is a prevailing party. We therefore DENY his motion for attorney fees.

ORDER

This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in

Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and [Forms](#) 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.